IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., Plaintiffs, vs. JOHN MERRILL, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1291-AMM April 14, 2022 Birmingham, Alabama 10:00 a.m.
EVAN MILLIGAN, et al., Plaintiffs, vs. JOHN MERRILL, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1530-AMM
MARCUS CASTER, et al., Plaintiffs, vs. JOHN MERRILL, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1536-AMM

TRANSCRIPT OF STATUS CONFERENCE
VIA ZOOM CONFERENCE
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

CHRISTINA K. DECKER, RMR, CRR
Federal Official Court Reporter
101 Holmes Avenue, NE
Huntsville, AL 35801
256-506-0085/ChristinaDecker.rmr.crr@aol.com

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

CHRISTINA K. DECKER, RMR, CRR
Federal Official Court Reporter
101 Holmes Avenue, NE
Huntsville, AL 35801
256-506-0085/ChristinaDecker.rmr.crr@aol.com

APPEARANCES

FOR THE SINGLETON PLAINTIFFS:

James Uriah Blacksher
JAMES U. BLACKSHER, ATTORNEY
825 Linwood Road
Birmingham, AL 35222
205-612-3752
Fax: 866-845-4395
Email: Jublacksher@gmail.com

Myron C Penn
PENN & SEABORN LLC
53 Highway 110
PO Box 5335
Union Springs, AL 36089
334-738-4486
Fax: 334-738-4432
Email: Myronpenn28@hotmail.com

Joe R Whatley, Jr
WHATLEY KALLAS LLP
2001 Park Place North Suite 1000
Birmingham, AL 35203
205-488-1200
Fax: 800-922-4851
Email: Jwhatley@whatleykallas.com

Henry C Quillen
WHATLEY KALLAS LLP
159 Middle Street Suite 2D
Portsmouth, NH 03801
603-294-1591
Fax: 800-922-4851
Email: Hquillen@whatleykallas.com

W Tucker Brown
WHATLEY KALLAS LLC
P.O. Box 10968
Birmingham, AL 35202-0968
205-488-1200
Fax: 800-922-4851
Email: Tbrown@whatleykallas.com

Diandra "Fu" Debrosse Zimmermann
DICELLO LEVITT GUTZLER
420 20th Street North
Suite 2525
Birmingham, AL 35203
205-855-5700
Fax: 205-855-5784
Email: Fu@dicellolevitt.com

Eli Joseph Hare
DICELLO LEVITT GUTZLER LLC
420 20th Street North, Suite 2525
Birmingham, AL 35203
205-855-5700
Fax: 205-855-5784
Email: Ehare@dicellolevitt.com

FOR THE MILLIGAN PLAINTIFFS:

Deuel Ross
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
Dross@naacpldf.org

Leah Aden
Stuart Naifeh
Kathryn Sadasivan
Brittany Carter
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
Laden@naacpldf.org
Snaifeh@naacpldf.org

Davin M. Rosborough
Julie Ebenstein
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
Drosborough@aclu.org
Jebenstein@aclu.org

Kaitlin Welborn
LaTisha Gotell Faulks
AMERICAN CIVIL LIBERTIES UNION
OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
Kwelborn@aclualabama.org
Tgfaulks@aclualabama.org

David Dunn
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
David.dunn@hoganlovells.com

Michael Turrill
Harmony A. Gbe
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067
(310) 785-4600
Michael.turrill@hoganlovells.com
Harmony.gbe@hoganlovells.com

Shelita M. Stewart
Jessica L. Ellsworth
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5600
Shelita.stewart@hoganlovells.com

Blayne R. Thompson
HOGAN LOVELLS US LLP
609 Main St., Suite 4200
Houston, TX 77002
(713) 632-1400
Blayne.thompson@hoganlovells.com

Sidney M. Jackson
Nicki Lawsen
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498
Sjackson@wigginschilds.com
Nlawsen@wigginschilds.com

FOR THE CASTER PLAINTIFFS:

Abha Khanna
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
206-656-0177
Email: AKhanna@elias.law

Aria C Branch
ELIAS LAW GROUP LLP
10 G St NE, Suite 600
Washington, DC 20002
202-968-4490
Fax: 202-968-4498
Email: ABranch@elias.law

Daniel C Osher
ELIAS LAW GROUP
10 G Street NE
Suite 600
Washington, DC 20002
202-968-4490
Email: DOsher@elias.law

Joseph N. Posimato
Elias Law Group LLP
10 G Street, NE; Suite 600
Washington, DC 20002
202-968-4518
Email: Jposimato@elias.law

Lalitha D Madduri
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
202-968-4490
Email: Lmadduri@elias.law

Olivia N. Sedwick
Elias Law Group LLP
10 G Street, NE; Suite 600
Washington, DC 20002
202-968-4518
Email: Osedwick@elias.law

Richard P Rouco
QUINN CONNOR WEAVER DAVIES & ROUCO LLP
Two North Twentieth Street
2 20th Street North
Suite 930
Birmingham, AL 35203
205-870-9989
Fax: 205-803-4143
Email: Rrouco@qcwdr.com

FOR THE DEFENDANT:

Andrew Reid Harris
OFFICE OF THE ATTORNEY GENERAL
CONSTITUTIONAL DEFENSE DIVISION
501 Washington Avenue
Montgomery, AL 36130
334-353-8891
Email: Reid.Harris@AlabamaAG.gov

Benjamin Matthew Seiss
ALABAMA OFFICE OF THE ATTORNEY GENERAL
P.O. Box 300152
501 Washington Ave (36104)
Montgomery, AL 36130
334-353-8917
Fax: 334-353-8400
Email: Ben.seiss@alabamaag.gov

Brenton Merrill Smith
OFFICE OF THE ATTORNEY GENERAL OF ALABAMA
P.O. Box 300152
501 Washington Avenue
Montgomery, AL 36130
334-353-4336
Fax: 334-353-8400
Email: Brenton.Smith@AlabamaAG.gov

Edmund Gerard LaCour, Jr.
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36104
334-242-7300
Fax: 334-242-4891
Email: Edmund.Lacour@AlabamaAG.gov

James W Davis
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
P O Box 300152
Montgomery, AL 36130-0152
334-242-7300
Fax: 334-353-8400
Email: Jim.davis@alabamaag.gov

Misty Shawn Fairbanks Messick
OFFICE OF THE ATTORNEY GENERAL
FOR THE STATE OF ALABAMA
501 Washington Avenue
P O Box 300152
Montgomery, AL 36130-0152
334-242-7300
Fax: 334-353-8440
Email: Misty.Messick@AlabamaAG.gov

Alexander Barrett Bowdre
OFFICE OF THE ALABAMA ATTORNEY GENERAL
P.O. Box 300152
Montgomery, AL 36130
334-242-7300
Fax: 334-353-8400
Email: Barrett.Bowdre@alabamaAG.gov

Thomas Alexander Wilson
STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Street
Montgomery, AL 36103
334-242-7300
Fax: 334-353-8400
Email: Thomas.wilson@alabamaAG.gov

J Dorman Walker
BALCH & BINGHAM LLP
P O Box 78
Montgomery, AL 36101
334-834-6500
Fax: 334-269-3115
Email: Dwalker@balch.com

COURTROOM DEPUTY: Frankie N. Sherbert

COURT REPORTER: Christina K. Decker, RMR, CRR

P R O C E E D I N G S

(In open court.)

JUDGE MARCUS: Good morning to all of you. And let me call the cases. We're talking about Singleton v. Merrill, Milligan v. Merrill, Caster v. Merrill.

And I'd ask you if you would be kind enough to state your appearances on the record, first for the plaintiffs, for the Singleton plaintiffs.

MR. BLACKSHER: Your Honor, good morning. This is Jim Blacksher for the Singleton plaintiffs. And Eli Hare is also in the conference with us.

JUDGE MARCUS: Good morning, sir, and welcome.

And for the Milligan plaintiffs?

MR. ROSS: Deuel Ross, Your Honor, for the Milligan plaintiffs.

JUDGE MARCUS: Mr. Ross, good morning to you.

And for the Caster plaintiffs.

MS. KHANNA: Abha Khanna for the Caster plaintiffs, Your Honor. Good morning.

JUDGE MARCUS: Good morning.

And for the State of Alabama and the intervening defendants.

MR. LACOUR: Edmond LaCour for Secretary Merrill, Judge Marcus.

JUDGE MARCUS: And good morning to you, sir.

And for the intervening defendants? Do we have Mr. Walker? Or are you representing them, Mr. LaCour?

MR. WALKER: I'm sorry, Your Honor. I'm present. Can you hear me?

JUDGE MARCUS: I hear you just fine, and welcome to you. Thank you.

MR. WALKER: Thank you, Your Honor.

JUDGE MARCUS: We have -- I just want to make sure -- Judge Manasco, you can hear us okay?

JUDGE MANASCO: Good morning. I can.

JUDGE MARCUS: And Judge Moorer?

JUDGE MOORER: Yes, sir, I can.

JUDGE MARCUS: All right. We set the matter down for a conference call today at the request of the plaintiffs who are seeking to proceed with discovery in whole or in part before the Supreme Court rules on the cases that it has taken.

With that, then, let me turn to you, Mr. Ross, if you would be kind enough to speak to your application.

MR. ROSS: Yes, Your Honor.

The Milligan plaintiffs believe that the Court can go forward with some discovery related to both the Section 2 claim and the racial gerrymandering and discriminatory intent claims.

You know, whatever happens in the Supreme Court, you know, even if the Court touches upon changes to the Section 2 standard, we certainly -- none of those issues are implicated,

with respect to our constitutional claims. And certainly the Court is unlikely to change the fact that, you know, evidence with respect to racially polarized voting, evidence with respect to the totality of the circumstances, the Senate Factors, all of that evidence is still going to be relevant because it's a part of the statutory text in fact.

And so, you know, we certainly appreciate that the Court could provide very -- some guidance specific to this case, but we don't think that that should preclude the parties from going forward with discovery and trying to prepare the case as much as possible ahead of whatever may happen with the Supreme Court.

And then finally, as the plaintiffs noted, the defendants have taken, from our perspective, an extreme position that they will seek a stay for any ruling that comes out basically after the beginning of September of next year. And so it really puts the Court and the plaintiffs in a bind if we have to wait until the Supreme Court comes out with a decision in June of next year before we even begin discovery or any other proceedings in this case.

JUDGE MARCUS: Let me ask you a couple of questions, if I could, Mr. Ross.

Could you tell us specifically what kind discovery you propose to be doing at this point? And let's break it into two pieces.

With respect to the constitutional claim -- and there you really have two -- is the racial gerrymandering claim, and there is an independent intentional discrimination claim.

What discovery would you propose to do now as to each of those, and what would you propose to do with regard to Section 2 that might not have to be completely redone when the Supreme Court rules?

MR. ROSS: Your Honor, with respect to -- so beginning with our intentional discrimination claims, we haven't had any discovery on those claims yet. We had some depositions, for example, of the defendants who are legislators, but they did not directly touch on allegations of discriminatory intent. They were focused primarily on the issue of racial gerrymandering.

And similarly, there may be questions that we may want to depose Mr. Hinaman again. I'm not saying that that's absolutely something that we would do, but it is something that is at least within the realm of possibility.

Your Honor, I can also imagine perhaps, you know, we imagine doing expert discovery. So releasing our expert report sometime this fall on discriminatory intent, and if the defendants have any sort of rebuttal expert report on that issue, at least with respect to our intent claim, there may be updated information or data related to racial gerrymandering for our experts on those issues to present.

And then finally, I guess similarly, with respect to the Section 2 claim, I can imagine the need for some discovery around some of the data that, you know, related to voter registration, to turnout issues that, you know, frankly, are not going to change between now and the -- whatever the Supreme Court does, but would be helpful for us to update any data that could be useful to the Court and to our experts.

JUDGE MARCUS: Let me just probe a little bit further with regard to racial gerrymandering and intentional discrimination.

You've said basically three things: One, you might want to depose the cartographer, Mr. Hinaman, again. That's one of the things I heard you say.

Two, you said you might want to do some additional expert discovery. In that respect, you put on some evidence with regard to circumstantial evidence going to the constitutional claims before.

And, three, you might want to depose some of the legislators.

Can you break that down more specifically for us so we have a more concrete example, to the extent you're able to do that?

MR. ROSS: Yes, Your Honor. So I guess more concrete -- with respect to each of the claims, or with respect to the specifics of what we may want to produce or have

produced to us?

JUDGE MARCUS: For example, what I'm asking, would it be your intention, if you had a green light from this Court, on the constitutional claims to seek to depose members of the Legislative Reapportionment Committee? Is that what you are getting at?

MR. ROSS: Potentially, Your Honor. That is one thing that we may seek.

We may seek additional documents that are in the possession of the reapportionment committee. We may, you know -- all of that information that could be useful to putting together our intent case.

And I think, you know, the other point that I was making, to be clear, was we will likely have an expert to testify with respect to, you know, laying out our evidence of discriminatory intent and that expert's assessment of that evidence. And so I imagine that that could be relevant.

And then the other thing that I think is the defendants have made the point repeatedly that they are simply redrawing the cores of prior districts. And so we may need discovery on that issue of how prior districts were drawn, and to the extent, you know, that core retention defense is a true defense or not.

JUDGE MARCUS: With regard to the Section 2 claim, I expect you will hear Mr. LaCour and Mr. Walker say and probe

why it wouldn't make more sense to conduct whatever discovery, remaining discovery has to be done on Section 2 after the Supreme Court has addressed Section 2. They framed the question clearly.

Why does that make sense simply to wait on the Section 2 discovery until the Supreme Court has ruled and we have a fair sense of where the law has settled?

MR. ROSS: Your Honor, the facts on the ground will not change between, you know, now and June of next year. So with respect to data or the decisions that were made last year, all of those things remain true, you know, remain discoverable today as they will tomorrow, as they will in a few months. And so I think it's important to at least get as much of that information now and process as much of that information now as possible rather than waiting when we're in what may be a two-month time crunch to try to do discovery, trial, anything else, in order to beat the defendants' deadline.

And the other thing that I think is important to note, Your Honor, is that obviously this Court is unique in that it is this Court's case that is in front of the Supreme Court, but other district courts have continued to, you know, move forward with their Section 2 litigation. In Texas, Georgia, and South Carolina, and Mississippi, those cases are all going forward and are not stayed, despite the fact that they also have Section 2 and racial gerrymandering claims that could be

affected by whatever the Supreme Court does in this case.

JUDGE MARCUS: Thanks very much.

Counsel for Caster, Ms. Khanna?

MS. KHANNA: Thank you, Your Honor.

As Your Honor knows, we have only the Section 2 claim, which we believe we've already proved up quite sufficiently. And certainly that doesn't mean that there couldn't be some additional discovery on Section 2, but I don't want to create any inefficiencies just for the sake of creating them. Honestly, our primary goal has been what it has always been, which is relief in time for the next election.

We tried for 2022. And this Court -- this Court's order was moving toward that. And, of course, that's no longer happening after the Supreme Court stay.

And I think my worst-case scenario, our worst-case scenario would be that we end up after the Supreme Court rules, and then starting again only to find that the State is again going to tell us that it's too late.

And so I guess a long way of saying that there's not a lot of Section 2 discovery alone that we believe needs to happen. Our biggest concern is that we are not starting from square one after the Supreme Court begins, or rules, and that the plaintiffs are now kind of boxed out of relief a second time.

JUDGE MARCUS: If we give you the go-ahead, is there any Section 2 discovery that you would actually do now, and if

so, what would it be?

MS. KHANNA: I think -- you know, I want to go back and look to see if we needed to -- obviously, we litigated our preliminary injunction motion on a highly expedited time frame -- to see if there's anything we wanted to supplement in our expert reports, maybe conduct expert depositions.

But I don't actually -- maybe there's a few Senate Factors that would require some document discovery, but I don't see anything mission critical for our Section 2 claim alone that would need to get fleshed out. At this point, you know, the Supreme Court has basically posed the question of whether or not Section 2 has been satisfied in this case, and we think it already has, given the evidence on the record.

JUDGE MARCUS: Let me reframe my question and put it this way: If the Supreme Court of the United States were to rule on this case next April, May, or June, would there not be sufficient time for you to conduct whatever Section 2 discovery you have to conduct thereafter, and still have this case brought to a head in a sufficient period of time to comply with the dates set by the Alabama Legislature?

MS. KHANNA: I believe so, Your Honor. What I can't say is what position the State will take about when it is too late. You know, our position is that it was not too late when we did this time.

So clearly I think we can expect a difference of opinion

about when is too late. I think that there's -- there can be sufficient time for 2024 relief, given even a June ruling in the Supreme Court. But I understand that the State has taken a position that anything after September, which is just three months later, is already too late for the following year's election.

So just the bind that we're in is if we felt we could get some assurances that we'll actually be able to work off of the Supreme Court's ruling in order to move toward relief for 2024, we would be happy to do so in order to eliminate any inefficiencies in duplicating efforts.

JUDGE MARCUS: Thanks very much.

Counsel for Singleton? Mr. Blacksher?

MR. BLACKSHER: Can you hear me now, Your Honor?

JUDGE MARCUS: I hear you fine. Thank you.

MR. BLACKSHER: So Singleton is a separate lawsuit, and it is not on appeal. The Singleton plaintiffs are not parties to the pending Voting Rights Act appeals. And the pending Voting Rights Act appeals provide no basis for Singleton not to proceed to trial and final judgment even though the preliminary injunction has been denied.

To the contrary, we believe the Wisconsin decision from last month says that Cooper vs. Harris requires a, quote, preliminary assessment, closed quote, of whether the State's enacted plan violates the Equal Protection Clause.

The Wisconsin court said that the Wisconsin -- I'm sorry -- the Supreme Court said that the Wisconsin court committed legal error in its application of the Supreme Court's rulings regarding the relationship between the constitutional guarantee of equal protection and the Voting Rights Act.

The Supreme Court said in Wisconsin, quote, The question that our Voting Rights Act precedents ask and the lower court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district would deny voters equal political opportunity, closed quote.

That question was not asked and answered in Milligan and Caster. It is asked in Singleton, and this Court should proceed to address it.

This Court said back months ago in its order denying our emergency motion to proceed with Singleton, We await further guidance from the Supreme Court before reaching the constitutional question. The Wisconsin decision provides that guidance.

And if this Court upholds the Singleton plaintiffs' constitutional claim, it may not be necessary to proceed at all to final judgment in the Voting Rights Act cases.

JUDGE MARCUS: Let me sharpen my question and ask you this: What discovery, if any, do you think you have to do with regard to your constitutional claims, and when is it that you propose to do it?

MR. BLACKSHER: Your Honor, we propose to file promptly a motion for summary judgment that answers that question. We believe that the evidence, the undisputed material facts are not in dispute, and that summary judgment is warranted now. But by virtue of the summary judgment proceedings, we can at least identify those material facts that are in genuine dispute, narrow the discovery and the issues for trial.

JUDGE MARCUS: Can you tell me more specifically at this point what discovery you would need to do?

I hear you to be saying basically that you have already made a prima facie showing, and there's not much more that you would have to do.

I'm simply asking what falls into the not much more that you would have to do category?

MR. BLACKSHER: At this point, we don't believe there is any more discovery that we need to do until we find out what position the State takes on how the evidence we have presented is insufficient to make up our Cooper vs. Harris claim.

JUDGE MARCUS: Thanks very much.

And let me turn to counsel for the state of Alabama, Mr. LaCour.

MR. LACOUR: Thank you, Judge Marcus.

We oppose moving forward on any discovery at this point until we get that guidance from the Supreme Court, because to

do otherwise is a guaranteed waste of resources.

This -- I mean, the Eleventh Circuit has recognized that it is a good reason, if not a great reason to stay a district court proceeding when there is an issue up on appeal in a different case that is likely to shed a lot of light on that district court proceeding at issue.

Here, we are well beyond that. It is the same case. It is the central issue in two of those three cases. And it's not just up on appeal. It's at the U.S. Supreme Court, which -- but beyond that, this is the even rarer case where we have heard from six justices who have said that this is an area of the law that is racked by uncertainty.

The Chief Justice in his dissent from the stay order said that he would take these cases for the purpose of resolving that uncertainty. And then you have Justice Kagan's dissent joined by Justices Breyer and Sotomayor, stating that the Court's decision to grant the stay order itself signals that there is going to be a change in the law.

So while what may have happened in the past obviously is not going to change, what's past is past. But how it's relevant or not we won't know until we've heard from the Court next term.

There may be something in that decision that signals that there is different evidence that we are going to need to develop, or it may be that there is a decision from the Court

that signals that all of this evidence that plaintiffs propose to develop over the next few months is completely irrelevant and was all for nothing.

Of course, plaintiffs might prevail on appeal. If they did, their preliminary injunction would remain -- the preliminary injunction would remain in effect and there would be no prejudice whatsoever. It could be we get a decision from the Court.

As you noted, Judge Marcus, the Court has framed the question in a very particular way. Does Alabama's 2021 map violate Section 2? They may answer that up or down. And in which case, there is no need for any further Section 2 discovery whatsoever, particularly if the State prevails.

And Ms. Khanna was suggesting that they've developed enough of the evidence that it's still premised on what the test is at the end of the day.

Moreover, the Wisconsin decision has come up. And we briefed that in our response. I think what that signals is that particularly -- I mean, in any Section 2 case, but particularly in ours, we think, there is attention -- and this Court recognized it both in the P.I. order and in the order denying the Singleton motions for ruling on their constitutional claims that these are -- these are intertwined issues on what Section 2 demands and what legal protection clause --

JUDGE MARCUS: Let's stop at that point and have you help me with this.

As to the Section 2 claim, I understand why your view would be that the law is not quite clear yet, and we do not know what the Supreme Court will say, and that, therefore, any discovery going to Section 2 is likely to be a waste of time and you may or very likely will have to go back to the well again with experts, which is at the heart of the case.

Let's put Section 2 aside. Help me understand why you think it is a waste of time to go forward on the constitutional claims. There we have two. We have a racial gerrymandering claim, and we have a discriminatory intent claim. They overlap, but they're surely distinctive claims.

Why would discovery on those matters at this time be a waste of time from your perspective?

MR. LACOUR: A few reasons, Your Honor. I mean, first, as this Court stated in its order denying the Singleton motion, Doc 114 of page 10 within the Singleton docket, the Singleton plaintiffs themselves acknowledge that the proper interpretation of Section 2 can be determinative of the merits of the constitutional claim.

So it may be there's no constitutional claim that even needs to be adjudicated at all, depending on how the Supreme Court rules on this case.

JUDGE MARCUS: That may yield a sound reason for

withholding any adjudication on the claim, but it does not necessarily follow that that yields a sound reason not to go forward with discovery on the constitutional claims.

What reason is there not to go forward with discovery either on racial gerrymandering or intentional discrimination now?

MR. LACOUR: Well, I do think how the Court rules -- and Justice Kavanaugh's concurrence joined by Justice Alito indicated that there is that interplay. I do think we are going see -- potentially see something from the Court that sheds light not just on Section 2, but also on the Equal Protection Clause and how it applies in these contexts and that interplay.

But second, I do think that the fact that there may be no need to adjudicate the case whatsoever is a valid reason not to adjudicate the claim. That could all be for naught. And this is very intrusive discovery looking into a legislature's thought processes. And I think there will be some fights over legislative privilege if we do move forward.

And then additionally, if the Section 2 claim survives and there's more litigation to do, it's all litigation over the same map, and a lot of the discovery that might be irrelevant for proving up Section 2, whatever that looks like after the Court has decided the case next term, could very well overlap with the Equal Protection Clause claim. So it may be they need

to talk to our map drawer Mr. Hinaman both for Section 2 purposes and for equal protection purposes. It makes sense do that work together, not to stagger it and have multiple -- multiple rounds of litigation, essentially.

So I think for all those reasons -- and we're talking about a -- particularly Section 2, I think is a guaranteed waste of time. I think with Equal Protection Clause claims, I think it's quite likely we will be spending considerable resources for -- potentially all for naught.

And I think that's why the courts routinely do grant stays in situations like this. It's why the Benisek three-judge court, which we addressed their decision in our briefing earlier this week, granted a stay sua sponte. That's also likely why the Thomas v. Merrill court granted a stay just a couple of weeks ago, as well, in litigation over the Alabama Senate and House districts.

And here it's this litigation over the same map that the Supreme Court is about to say a lot about in just a few moments.

JUDGE MARCUS: In order to stay the claim for racial gerrymandering, the plaintiff must show either through circumstantial evidence or direct evidence legislative purpose and intent that race was the predominant factor motivating the Legislature's decision to place the significant number of voters within or without a particular district. That law seems

pretty well settled.

Do you see anything in the tension between Section 2 and the Equal Protection Clause that would dislodge the plaintiff from otherwise bearing that burden of showing that race was the predominant factor motivating the Legislature's decision?

MR. LACOUR: And there's still this lurking question in these cases as to whether compliance with Section 2 is sufficient to justify racial gerrymandering. So I think that is an issue that may come up when the Court decides -- I think the Court is going to shed light on what Section 2 allows and requires, which could shed light, as well, on the equal protection issue.

JUDGE MARCUS: Well, I don't doubt that the issue of whether or not compliance with Section 2 is or is not a compelling interest and what narrow tailoring might look like are very much open questions.

What I'm having trouble understanding -- and you can help me with this -- is why it would not make sense for them to conduct discovery as to this singular question of whether race was the predominant factor that motivated the Legislature to codify HB1.

The only way that wouldn't be relevant would be if there's one resolution of Section 2 making it unnecessary. But saving for that, it seems to me we're still going to face that constitutional claim, and they're still going to have to do

some discovery with regard to that.

He proposes to perhaps depose the cartographer Hinaman again. He proposes to depose some legislators who may very well have and may very well assert in some instances a legislative privilege. And he proposes to put on an expert going to discriminatory intent.

All I'm asking is whether or not that's more likely than not to be with us, regardless of what the Supreme Court says with regard to the Section 2 claim.

MR. LACOUR: I take your point, Your Honor, and I do think it's potentially going to be in the case depending -- assuming that plaintiffs don't prevail on Section 2.

But if there's still Section 2 litigation to be done, it could be that many of those inquiries in depositions, expert reports, and our rebuttal reports will overlap when it comes to litigating both the equal protection claim and the Section 2 claim when Section 2 has been clarified.

And so we're trying to make sure we can do this in an efficient manner. And, again, we do think it's a good enough reason that this is very intrusive discovery that may be completely unnecessary to avoid to get into the mental processes of the Legislature.

JUDGE MARCUS: Let me ask the question this way -- and maybe it's the $64 question here. And it seems to be what animated the plaintiffs to make this application at this time.

And it's the question of timing.

Let us assume for the purposes of the question the Supreme Court doesn't rule until the late spring of '23 in this case on the essential Section 2 matter. That doesn't seem to leave a whole bunch of time left before the dates that the Alabama Legislature has codified.

We know November 10th, '23, is the date for folks to file a qualifying application. We know March 4 is the primary date, and those dates are earlier than the dates that otherwise obtain in '22 because it's a presidential election year.

All of that being the case, if they have to go back to the drawing board on Section 2, and the basic law on intentional discrimination essentially remains the same, there still might be some discovery to be done there, is there enough time?

Let's say the Supreme Court decided this case in June of '23. That leaves you July, August, September, October, looking at a November 10th qualifying date. That's four months and two weeks, basically. Could be five months if they ruled early in the month of June. Is that enough time for us to be able to give them a fair shot to be heard in a court of law without finding ourselves in the position where it's too late?

MR. LACOUR: Your Honor, we do think that there would be sufficient time for them to adjudicate the matters enough to get some sort of -- it may not be a final judgment. It might be another P.I., assuming you got a June ruling. That would

still leave more time than we had between the November 16th filing date of the Milligan complaint and the December 15th filing of the P.I.s in this case, which resulted in a P.I. order just a little over a month later on January 24th.

If we have a June ruling, that would still leave at least -- I mean, I think you have at least a couple more months time to work with having you already --

JUDGE MARCUS: What -- I'm sorry. I didn't mean to cut you off.

JUDGE MOORER: Judge Marcus, I have a question that I --

JUDGE MARCUS: It seems to me it would leave you until the 10th of November. That would leave you roughly five months. What is it that you would see the Court do in terms of a schedule over that period?

MR. LACOUR: Your Honor, it would obviously depend on the contours of the Supreme Court's ruling. But I think we could meet shortly thereafter the Court's ruling comes down, propose a schedule at that point, and then move forward with certain dates -- with a certain end date in sight. And with more time, significantly more time than we had the last go around when, again, due to the delays caused by the pandemic and the Census Bureau taking many, many additional months to produce the data that we needed to produce our maps. All this litigation was pushed back significantly later than it normally

would have been, which is what created the time crunch in the first place.

But we have developed a lot of evidence. As Ms. Khanna just noted, the Caster plaintiffs think they have enough evidence already with the reservation that they want to develop some more. But we -- this Court has heard 2,000 transcript pages worth of testimony up to this point.

And so I think we would be starting, even -- and I'm not trying to fight your hypothetical, but we cited a few recent major redistricting decisions from the Supreme Court where the Supreme Court heard arguments and decided the case four-and-a-half months later, over two months later, or on the late end of it, six months later rather than the full eight months of the term. So I do think we will have -- more than likely have time -- than we will if there was a June ruling.

But I think if we could convene shortly after the decisions come down, probably some schedule. And it might be somewhat expedited like it was last time around, but at least we would know what we were aiming at. But evidence that is relevant because we will have the standards in front of us, and we will know if there even is a Section 2 claim to adjudicate or not. That will tell us what's relevant when we're deposing -- when the map drawers are being deposed, or when Senator Pringle is being deposed again, or whatever other

discovery it is that plaintiffs might demand of us.

And the discovery we will need to ask for from them and experts we might need to develop based on the state of the law once the Supreme Court has clarified this wide range of uncertainties, to borrow from the Chief Justice.

JUDGE MARCUS: I think Judge Moorer had a question.

JUDGE MOORER: Yes, I do, Judge Marcus. Thank you.

I need to ask I think a more pointed question, and I think one that doesn't depend upon the Supreme Court, and it's something that the defendants will know. Specifically, the Secretary of State should know.

And this is a question that I think, Mr. LaCour, that you need to ask the Secretary of State, which is, A, what is the absolute latest date that the Secretary of State must know the parameters of the district and who the candidates are to be able to conduct the election. Then we can plan from there. Because the Supreme Court has and could release an opinion in August, as late as August. I know you have what they have done previously, but unless someone on the Supreme Court has told us, we don't know when their decision will be, and it could be as late as August.

So if we know from the Secretary of State when the latest date that they must know the districts and the candidates, we can then plan accordingly. Could you let us know that by next Wednesday?

MR. LACOUR: By next Wednesday, Your Honor? Yes, I can confer with the Secretary of State on that question and provide you an answer.

JUDGE MARCUS: Do you have any answer to that at this point?

MR. LACOUR: Your Honor, I don't have a hard and fast deadline. I think part of the issue is how dramatic the changes might be, if there were changes to be made.

I will just note, I mean, qualifying ends on November 10th. Qualifying begins October 24th of 2023.

We did not say that September was a drop-dead deadline. We just simply noted that Nate Persily, who the judges are familiar with had -- has recommended the goal of the imposition of a plan no later than a month before candidates begin qualifying. So that's something we had noted in our preliminary injunction briefing. And, ultimately, we have quoted from one of his articles, so...

But I will certainly be happy to check in with the Secretary of State and get a firmer answer.

JUDGE MARCUS: Judge Manasco, questions for Mr. LaCour?

JUDGE MANASCO: Well, I have a few questions, some for Mr. LaCour, and some for others. But if you want to hear from Mr. Walker first, I'm happy to --

JUDGE MARCUS: That would be great. Mr. Walker?

MR. WALKER: Your Honor, thank you. I have nothing to add to what the Solicitor General said.

JUDGE MARCUS: All right. Thank you.

Judge Manasco?

JUDGE MANASCO: All right. Well, the first question I have is sort of a practical one that I don't think we have talked about yet.

You know, one of the arguments that was made in the first instance a little bit to us, but then also to the Supreme Court, was using expert evidence adduced on the constitutional claim in connection with the P.I. hearing against arguments made to support the Section 2 claim in connection with the P.I. hearing.

And so although I understand, of course, that the constitutional claims and Section 2 claims are separate, and that the fact evidence on the constitutional claims, it is what it is and will not change, my question is, you know, when you have an expert witness, a lawyer deposing the witness, and a lawyer defending the deposition, what degree of confidence do each of you have that you can decide what to ask the expert witness and how to counsel the witness to answer on the constitutional claims without knowing the potential relevance of that expert's testimony to the Section 2 claims?

MR. LACOUR: I will be happy to go first unless Mr. Ross would like to. But I do think you put your finger on

something important here.

We think it's highly relevant --

(Technical glitch.)

(Recess.)

JUDGE MARCUS: Mr. LaCour, you were in the process or maybe at the beginning of answering Judge Manasco's questions, so why don't we turn to you?

MR. LACOUR: Thank you, Your Honors. I will try to repeat what I said before we lost the court reporter.

But the point I was making was I do think that Judge Manasco has put her finger on something that, particularly when you are litigating over one map with these intertwined issues that are presented by Section 2 and the Equal Protection Clause, that what a witness who might be viewed as an equal protection witness says, I'm very well -- pretty relevant to the certain Section 2 issues, and vice versa, which not only will inform what questions might be asked, or what points we would want to develop through a witness, but how we counsel our clients and witnesses, as well. And so we think that would further militate in favor of waiting to press forward into the uncertainty until it's been clarified by the Supreme Court.

JUDGE MARCUS: Judge Manasco, I think you had a number of questions, and perhaps you will have that for the other attorneys, as well.

JUDGE MANASCO: I do have a few more questions, and I

would love to hear what Mr. Ross and Ms. Khanna and Mr. Blacksher, if he would like to comment, what their views are on that one.

MR. ROSS: Yes, Your Honor.

So, you know, certainly we understand, at least we think we have an understanding of what Mr. LaCour has tried to use some of our racial gerrymandering evidence for, with respect to the Section 2 case.

Obviously, we have argued that's not relevant. That would prevent them from asking questions in a deposition even if we don't believe that those questions are particularly relevant to our Section 2 claim.

You know, as you know, a deposition or discovery can be broader than what ultimately is presented to the Court. And so even if Mr. LaCour may want to ask some of our racial gerrymandering experts questions that he thinks are relevant to the Section 2 claim, we certainly wouldn't object to that. And so we don't think that that prevents any aspect of this case going forward.

And one other thing that I would say, even with respect to the Section 2 case, Your Honor, you know, the facts of what happened in a 2018 election, whether or not voting was racially polarized or not, or elections ten years ago, or, you know, Alabama's history of discrimination, or any of the other Senate Factors, just as the facts related to -- you know, the intent

will not have changed. We don't think that those facts will change. Some of the relevance will change. And ultimately what the Court may rule on and how plaintiffs may end their arguments may be different.

And so perhaps that counsels towards waiting for ultimately ruling, certainly, until after the Supreme Court comes out with a decision, and perhaps even waiting for trial until that point. But it doesn't preclude, or at least plaintiffs don't think it precludes discovery on those issues.

And the last point I will make to just follow up on some of the things that were said is that the Milligan plaintiffs certainly think that we have presented a strong Section 2 case. And that, you know, we agree with Ms. Khanna that there is perhaps not as much additional evidence under Section 2 case that needs to be developed. But, you know, we also believe that there are, as I said, things that -- facts that will not change.

The Supreme Court said as recently as the Wisconsin decision last month that racially-polarized voting is relevant both to Section 2 and to racial gerrymandering. And so some of that evidence that we may want a little bit more information on is relevant to both claims. And the Supreme Court, you know, doesn't appear to be willing to change things, with respect to what's relevant on those issues.

JUDGE MANASCO: Great. Thank you.

Okay. Ms. Khanna or Mr. Blacksher.

MS. KHANNA: Thank you, Your Honor. This is Ms. Khanna, on behalf of the Caster plaintiffs.

As you know, we only have the Section 2 claim. I'm not sure I am allowed to have an opinion on how the other claims proceed. So I firmly believe that as the law exists right now, the claims, the evidence, the standard is very clear. And I am hopeful that whatever clarity -- further clarity the Supreme Court provides, maintain -- allows us an ability to continue to pursue our Section 2 claim irrespective of whatever -- whatever the other two claims are.

I have disagreed with the State's approach on -- kind of muddied the waters between the two claims and the various evidence and relevance to both under the existing legal standard. We will see what the legal standard ends up being.

But I'm not sure I have any much more to add on how the other claims should proceed in the interim.

JUDGE MANASCO: All right. Mr. Blacksher?

MR. BLACKSHER: Judge Manasco, so to answer your question, I think's important to go back to what Judge Marcus said.

It is, of course, settled law how to establish a racial gerrymander claim and what the State must do in order to justify a race-conscious plan.

It is now also settled law that that issue of whether the

enacted plan complies with the Equal Protection Clause is a question that must be decided before proceeding to the Section 2 issues. And, consequently, that is an issue that should be dealt with now.

The discovery involved, with respect to, for example, expert witnesses on the gerrymander issue do not implicate the same standards as if you were pursuing an intentional discrimination claim.

The intent involved in a racial gerrymander claim is simply whether the State knowingly enacted the plan that separates black voters from white voters, okay?

The evidence that an expert would provide on an intentional discrimination claim under the Arlington Heights standards goes to whether or not there was invidious intent, not the intent to separate voters by race. Because the intent to separate voters by race does not depend on whether the Legislature intended to benefit a class of voters or to discriminate against them. It simply says did you knowingly enact a plan that separates voters by race. So there would not be that overlap, with respect to any experts.

And, indeed, in our case, as you know, the Singleton plaintiffs contend that no expert is needed, that it is undisputed. It is undisputed by the State that they knowingly perpetuated the gerrymander that was started in 1992 for reasons which they believe they can justify by whatever means.

So, and let me just address this, too, if I may. This Court declined or deferred ruling on the Singleton claims based on the principle of constitutional avoidance. But there are several contexts for constitutional avoidance. And perhaps the most important context is avoiding a reading -- a reading of the law or the application of the law in a way that calls into question the constitutionality of a statute.

It's the constitutionality of Section 2 and the way this Court applied it that is before the Supreme Court right now. And yet there is no doubt, there is no unsettled law that would prevent this Court from dealing with the issues in this case and the map that the State of Alabama enacted by going ahead with the Singleton plaintiffs' claim. And, therefore, as we do not agree that there is an overlap in the evidence that would be needed in any discovery, whatever the State says we need, in order to pursue that claim.

JUDGE MANASCO: Okay. Thank you.

Okay. Just two more questions from me. And the next one is, I think really just for Mr. Ross, although if anyone else would like to comment, you're certainly welcome.

Mr. Ross, you recall that we consolidated, you know, the three cases, or two, and then joined in Caster just for a coordinated hearing. But what is the position of the Milligan plaintiffs, with respect to consolidation, going forward, if the Milligan plaintiffs', you know, request for discovery is

granted in part or in whole, or has that been discussed?

And I guess relatedly, you know, separate and apart from a formal consolidation, have there been any conversations about continuing to coordinate discovery?

MR. ROSS: Your Honor, for the Milligan plaintiffs, you know, our view is that the cases should not be consolidated outside of discovery. And so we're open to obviously not having to do multiple depositions. If the Milligan plaintiffs want to depose someone that the Caster or Singleton plaintiffs think are relevant, we wouldn't require multiple tracks of depositions, or discovery requests, or things of that nature. But, ultimately, we think the cases are distinct enough that they should not be consolidated for any other purpose.

We're open to further discussions on the issue, but at this point, we are opposed to -- excuse me -- consolidation outside of discovery.

JUDGE MANASCO: Okay. Thank you.

Any comments from anybody else on that question?

MR. LACOUR: Your Honor, we still think consolidation is warranted. It's common in redistricting suits because there is only one map.

And, as you know, and before -- you know, a lot of the evidence that's relevant to one claim is relevant to the other, whether that's intentional discrimination, racial gerrymandering, or Section 2, for that matter.

JUDGE MANASCO: Okay. Anybody else?

MS. KHANNA: Your Honor, I don't have a strong position on consolidation. Certainly our main position on consolidation was about the single judge versus the three-judge panel, just the jurisdictional issues which may become live again once this case is back from the Supreme Court.

But other than that, I would only add that to my previous answer about how the relationship between the multi -- the various claims here, certainly we as the plaintiffs would like to know whatever the new legal standard is and have the opportunity to satisfy that legal standard once we learn more from the Supreme Court.

I believe that the discriminatory intent, race-based -- our discriminatory intent claims be separate from that inquiry altogether. And perhaps that that, you know, can proceed on a separate track and a discovery track in the meantime.

I'm not quite sure how that relates to the racial gerrymandering. Maybe that's kind of too nuanced and collapsed.

I think what's really driving the question here about schedule is the timing, as we all know. The State's deadline -- filing deadline is November 10th for a March primary, which is a long time, a long time in between.

And, I mean, I know I am just a broken record here, but, you know, we brought a Section 2 case last cycle and were told

by the State it's too late. We brought a Section 2 as soon as the map passed the cycle and were told by the State it's too late.

We intend to pursue our claims as quickly as we can once the Supreme Court tells us what we can and should do. And I -- all I would ask is some assurances that the State won't tell us that it's too late, and that the State will provide some assurances that, to the extent there's a claim to be made, that it will make every effort to allow that to happen for 2024 relief.

And if that means that the November 10th filing deadline has to get pushed a little bit, or some other adjustments need to be made well in advance so that everybody can have all the notice that they need, that would be fine.

I just -- whatever, whether it's we need to start a schedule now in order to prevent that from happening, or leave flexibility for the schedule to be -- on the back end to be adjusted, all the Caster plaintiffs would ask for is the chance to actually get relief in time for the 2024 election.

JUDGE MANASCO: Thanks.

Mr. Blacksher, any answer to the question?

MR. BLACKSHER: Your Honor, I think you can -- excuse me.

JUDGE MANASCO: Go ahead.

MR. BLACKSHER: You can appreciate how the Singleton

plaintiffs would prefer not to be consolidated.

We were the first case was filed back in September of 2021. We have been unable because of consolidation to get a ruling from this Court on any of the issues we presented or to get to discovery.

The racial gerrymander claim or the plan Singleton plaintiffs present under the Equal Protection Clause is the only -- is the only claim that addresses the question of whether or not the State examined -- did the inquiry into whether or not there were racial-neutral alternatives to a race-conscious plan.

As I understand the complaint in the -- of racial gerrymandering in the Milligan case, it only argues that the racial gerrymandering was based on packing, and that this Court should do a better job of -- or a fairer job of racial gerrymandering as a remedy. It does not, I think, raise the race-neutral issue that we do in Singleton.

So for those reasons, and because of the confusion -- the confusion has cost us and our clients the ability to get our claims heard -- we would be opposed to consolidation.

JUDGE MANASCO: All right. Last question from me. And I think this is for Mr. Ross, Ms. Khanna, and Mr. LaCour.

And I apologize that I don't know the answer to it off the top of my head as I sit here.

Has there been a motion to expedite or any similar request

filed in the Supreme Court, and, if so, has the State opposed it?

MR. ROSS: There has not, Your Honor. The Court has set tentative argument for October, the October term, which -- and we have a briefing schedule in place. The defendants' brief is due April 25th. Plaintiffs' brief is due July 11th. And then the defendants' reply brief is due, I think about 45 or so days after that.

And so right now I -- the October term seems perhaps the earliest date at which the Supreme Court could hear it. And I do not believe the Supreme Court -- you know, there's no way to expedite the Supreme Court hearings beyond that, as far as I'm aware, Your Honor.

So that's my understanding of where things stand right now.

MR. LACOUR: Your Honor, I will just add that we noted this in our filings earlier this week, that in the letter that the Court sent us setting the case for the October term, they stated it will likely be argued in October. That October calendar has not been set yet, but it indicated it is likely to be argued in October.

JUDGE MARCUS: Let me ask Judge Moorer -- were there other questions, Judge Moorer, that you had for any of the attorneys?

JUDGE MOORER: No, sir.

JUDGE MARCUS: I had just a few that I wanted to raise.

First, with regard to the consolidation -- this question is for you, Mr. Ross. I heard you to say that you would not want your case to be consolidated for the purposes of the trial at all. Did I hear that right?

MR. ROSS: Yes, Your Honor. At this point, we're opposed to consolidation beyond discovery. You know, Your Honor, this is not a hard and fast rule.

JUDGE MARCUS: Oh, I understand.

MR. ROSS: Yes.

JUDGE MARCUS: The reason I ask the question is obviously you have some issues in common with Mr. Blacksher and the Singleton folks, and you have some issues in common with Ms. Khanna and the Caster folks. So by your lights, you would see us pursue this case whenever we get around to doing it in three separate proceedings?

MR. ROSS: I think, Your Honor --

JUDGE MARCUS: You understand the thrust of my question. By your lights, we would try Milligan on the constitutional claim. And whatever we do with the Section 2 claim, depending on what the Supreme Court says, then we would try -- really, the Court, the single judge would try separately the Caster Section 2 claim. And Mr. Blacksher would have us try separately the constitutional claim that he's raised.

MR. ROSS: Right.

JUDGE MARCUS: You see why I asked the question.

MR. ROSS: Yes, Your Honor. I totally understand.

And I will add to that that there can only be one map that Alabama used for congressional districts. And so we understand -- excuse me -- certainly understand the problem that makes for the Court, and certainly understand that the Court may, for administrative convenience, consolidate cases, and that that doesn't make parties or, you know, cases in one another's -- excuse me -- parties in one another's cases.

And so, you know, with those caveats, that is why, Your Honor, understanding the position that it would put the Court in, that is why I would tell you it is not a rule that, you know, a hard and fast rule. It is a strong preference, however, Your Honor, that we not be further consolidated with the others.

JUDGE MARCUS: And I understand that in many ways this is very, very premature, but I appreciate the position Mr. LaCour has taken, with regard to being in three sets of parallel proceedings where they're identical in some respects and disparate as to others.

And I hear Ms. Khanna to be saying that, depending on how the -- and the dust settles in this case, she might not be opposed to actually trying the Section 2 case with you.

Did I hear that right, Ms. Khanna? Or did I misapprehend?

MS. KHANNA: No, you didn't misapprehend, Your Honor. I don't think we would -- we certainly won't move for consolidation, but I --

JUDGE MARCUS: Of course.

MS. KHANNA: -- am not sure on the, just to the expediency and the efficiencies, I have much of a basis to oppose consolidation, given that the -- the length that the Court has gone to, to preserve the jurisdictional issues.

JUDGE MARCUS: Thank you.

I have a question, Mr. LaCour, for you. You raised a point, and Judge Manasco questioned each of the lawyers about it.

And that is to say, to the extent that expert testimony is adduced on the constitutional claim, what you ask the expert witness on the constitutional claim is related, and in some ways may be closely related to the Section 2 claim and where the law settles out on that. I appreciate the point. My question is a slightly different one, though.

To the extent that there are fact witnesses on the constitutional claims that are going to be taken, why couldn't those fact witnesses go forward? Accepting the point that you make about experts. To the extent you have to focus on intent, and the nature of the intent is different, whether it's racial gerrymandering or intentional discrimination, why would it not make sense in the interest of time, given that we may be facing

some real tight deadlines here, to go forward with the fact witnesses on the constitutional matters?

MR. LACOUR: Your Honor, I think because there may still be some things that they would have to say that could be relevant to the Section 2 claim, depending on how the Section 2 issues are sorted out by the Supreme Court in the coming months.

JUDGE MARCUS: No. I take your point on that.

But to the extent that we are bearing like a laser beam on the constitutional claims, that stuff could go forward. It might be that you would have to bring them back with some brief supplemental discovery on the point that you raised.

But I am just sort of curious why the fact stuff couldn't largely go forward in the interest of timing and expedition, accepting that you might have to do more -- a little bit more later?

Is there any other objection other than it puts you to extra expense, which I appreciate?

MR. LACOUR: It puts us to extra expense. It's intrusive to the extent you are delving into multiple processes of elected representatives of the state. It may be all be for naught if plaintiffs prevail on the Section 2 claim. And we do think that there will be -- there certainly will be more time after the Supreme Court rules than there was to adjudicate the initial preliminary injunction motion in this case.

So I think all of those come together. Obviously, there's nothing stopping the Court from allowing that to move forward. But I think judicial economy, risk of prejudice, all these factors fit together to suggest that a pause in litigation makes imminent sense here more so than -- I can't really imagine a case it would make more sense to go ahead and wait in light of what we have already heard from six justices of the Supreme Court in these cases.

JUDGE MARCUS: Any other comments by any of the other attorneys? Mr. Ross? Ms. Khanna? Mr. Blacksher?

MR. ROSS: Your Honor, before we end, I just wanted to clarify that the State would be responding to Judge Moorer's request that by --

JUDGE MARCUS: Yes. I will get to that, yeah.

But anything else with regard to the dialogue we have had, or any other questions that have been raised?

MR. ROSS: No, Your Honor.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: No, Your Honor.

JUDGE MARCUS: All right. Mr. Blacksher?

MR. BLACKSHER: No, Your Honor.

JUDGE MARCUS: All right. Mr. LaCour, anything further?

MR. LACOUR: No, Your Honor.

JUDGE MARCUS: And Mr. Walker?

MR. WALKER: No, Your Honor. Thank you.

JUDGE MARCUS: All right. We will proceed in the following way, then: We will ask you, Mr. LaCour, if you can get us and file with the Court an answer to the question that Judge Moorer put to you by the end of business on Wednesday, the 20th, of April.

I think you have the question that he's posed, or do you need me to frame it again?

MR. LACOUR: What I typed out in my notes was the absolute latest date the Secretary of State must know parameters of the districts and who the candidates are in order to then conduct the election.

JUDGE MARCUS: Right. So that will go into printing, and all of the practical administrative steps that have to be taken.

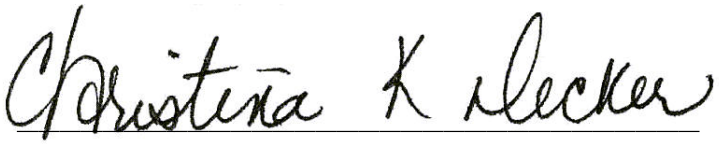
All right. With that, we thank all of you for joining us. And you will hear from us after we have a chance to study the Secretary of State's response.

Thank you. This Court is adjourned.

(Whereupon, the above proceedings were concluded at 11:17 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



04-19-2022

Christina K. Decker, RMR, CRR — Date

Federal Official Court Reporter

ACCR#: 255